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Wiretapping the Mind: A Call to Regulate Truth Verification in Employment

SUSAN GARDNER*

Advances in modern investigative techniques are challenging our traditional notions of individual privacy. This article examines private industry's use of polygraph tests on current and prospective employees and discusses the competing interests of an employee's right to privacy and management's right to be secure from employee deception.

INTRODUCTION

If the right to privacy means anything at all in our society, it means that people are entitled to have thoughts, hopes, desires, and dreams that are beyond the grasping reach of a bureaucrat, an employer, or an electronic technician.1

"We're not dealing with people's lives. We don't make any judgments." So commented an owner of a pilferage control service during a recent interview. Using a truth verification device2 known as a

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2. Evans, Controlling Employee Theft Possible with Lie Detectors, Chico Enterprise-Record, June 18, 1983, at 10A, col. 1.
3. The term "truth verification" refers to those technologies, present and future, which theoretically are capable of or are used to uncover deception. Traditional truth verification technologies are the polygraph, A. LEMOND & R. FRY, NO PLACE TO HIDE 123-33 (1975), and sodium pentathol or truth serum. Depres, Legal Aspects of Drug-Induced Statements, 14 U. CHI. L. REV. 601 (1947). Other devices include the Psycho-
galvanic skin response lie detector, the owner offers business organizations programs in internal security, including testing of workers prior to employment or promotion. Confronted with employee thefts estimated at billions of dollars annually, employers increasingly view truth verification devices as a panacea to insider crime. In 1982, more than one million applicants and employees were subjected to lie detector testing as a condition of employment. An estimated 30% of the Fortune 500 companies regularly administer polygraph examinations to their employees. Industry proponents argue that management has an overriding interest in employing workers who do not and will not steal. They point to the increased reliability of truth verification devices and resultant reductions in theft from their usage as justification for these examinations.

Opponents, however, decry the widespread use of lie detection devices as a recent development in lie detection technology. The Psychological Stress Evaluator (PSE) which records an examinee's voice, Comment, The Psychological Stress Evaluator: A Recent Development in Lie Detection Technology, 7 U.C.D. L. REV. 332, 333 (1974); a lie detection seat which registers movement without the examinee's knowledge during the examination ("wiggle seat"), Craver, The Inquisitorial Process in Private Employment, 63 CORNELL L. REV. 1, 30 (1977); hidden cameras to photograph and measure pupil dilation (retinoscope), id.; and the Silent Answer Test which requires no verbal answers, Horvath & Reid, The Polygraph Silent Answer Test, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 285 (1972). Future technologies may include "machines capable of reading thought through the interpretation of cerebral impulses" and "sensing devices implanted in the human body." Craver, supra, at 30.

Truth verification devices are used in any or all of the following employment contexts: pre-employment screening of prospective employees; examination of employees in connection with particular incidences of wrong-doing; and, routine re-examination of current employees to act as a deterrent to wrong-doing. See Craver, supra note 3, at 30; A. WESTIN, PRIVACY AND FREEDOM 148-49 (1967).


Other articles have indicated one-fourth of all major corporations administer polygraph examinations. See, e.g., Comment, The Polygraph and Pre-Employment Screening, 13 Hous. L. REV. 551, 552 n.8 (1976).
vices in the employment relationship. Two primary criticisms spark serious debate—one, instrument reliability and examiner competence; and two, intrusion into the privacy of workers. Contrary to the opinion of industry advocates, opponents contend many honest and innocent workers are denied employment opportunities. Further, questions addressed to workers often go well beyond the job-related concerns of employers and at times probe into the most sensitive recesses of a worker's life. This loss of human dignity coupled with a lack of scientific support for truth verification techniques in employment refute the claims made by industry that people's lives are not affected and that judgments about those lives are not made.

The controversy pits the property interests of employers to secure their businesses and to select employees by their standards against the privacy interests of workers to be left alone. This article examines the controversy surrounding industry's use of truth verification techniques by describing the theory of those techniques and analyzing the competing interests of employers and employees. This article proposes regulation of truth verification techniques in the employment relationship.

THE TRUTH VERIFICATION PROCESS - IN THEORY

Society has always engaged in activities to elicit truthful responses from individuals. Procedures have ranged from the application of hot irons to trial by ordeal. Today, truth verification techniques are more sophisticated, although similar in theory to their more primitive predecessors.

The most common truth verification device is the polygraph or "lie detector". However, the polygraph does not detect lies; rather, it measures observable physiological responses to emotional stress. Theoretically, lying leads to emotional conflict caused by the fear of detection. More stress results from telling a conscious lie than from

10. See MACNEIL-LEHRER, supra note 5, at 1.
11. The right of privacy was enunciated in 1890 as the "right to be let alone." Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890).
12. See J. LARSON, LYING AND ITS DETECTION 65-93, 171-253 (1932); Highleyman, The Deceptive Certainty of the Lie Detector, 10 HASTINGS L. J. 47, 52 (1958); 1974 Comm. Print, supra note 5, at 5 ("Lie detection through physical change is actually a throwback to early forms of trial by ordeal.") (quoting Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 YALE L. J. 694, 696 (1961)).
telling the truth. This induced anxiety results in measurable and distinguishable physiological changes in pulse rate, blood pressure, skin conductivity, perspiration rates and breathing amplitude. These recorded physiological changes are interpreted by an examiner who is expected to separate and expose a lie from the truth.

The theory underlying truth verification presupposes the examiner will adopt a proper technique to enable correct diagnosis of test results. Examinations should be administered in a nonthreatening environment free from distraction. Subjects are given a pretest interview to familiarize them with the questions and to determine the existence of psychological factors which may preclude a valid process. Once the device is connected, the worker is asked a battery of questions designed to ferret out lies and eliminate incorrect interpretations. Three types of questions are addressed most frequently to workers—control, irrelevant, and relevant questions. The control and irrelevant questions establish respectively deceptive and truthful norms and patterns of responses. The relevant questions are substantive, specific, and reflect the purpose for the examination. When relevant questions provoke emotional stress with measurable deviations from truthful baselines, presumably deception is indicated.

In summary, the theory underlying truth verification assumes a correlation exists between prevarication and physiological responses. It further assumes those changes are measured objectively by truth verification techniques and interpreted accurately by examiners.

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18. See Polygraph Hearings, supra note 1, at 182-84; J. Reid & F. Inbau, Truth and Deception: The Polygraph (“Lie Detector”) Technique 28 (1977) (control question is “a question about an act of wrongdoing of the same general nature as [that] under investigation, and . . . [about] which the subject . . . will lie . . . .”) (emphasis in original).
19. See Horvath & Reid, supra note 18, at 276-77; Skolnick, supra note 14, at 697 et seq.
20. See M. Mayer, Rights of Privacy 79 (1972): “The thesis of the machine's proponents is that lying causes definitive responses that must inevitably show up on the interpretive chart. From the subject's 'conflict' fear and anxiety are recorded and these become readable to the expert. Truth is vindicated and falsity exposed.”
THE INTERESTS OF WORKERS

Three workers are requested but not required to submit to polygraph examinations—an applicant for a firefighter position; a bartender after money is found missing; and, a manager of a combination gas station and convenience store even though nothing has been reported stolen or missing. Each submits to the examination, albeit reluctantly, fearing that failure to take the test casts an appearance of dishonesty upon them. The workers have corrugated rubber tubes called pneumographs fastened around their chests and abdomens to measure respiration rates. Two electrodes are connected to their fingers to measure skin conductivity and cardiophygmeters, consisting of inflated rubber cuffs placed on their arms, measure pulse rates and blood pressure. Immediately after the devices are connected, the interrogations begin. Among the questions asked the prospective firefighter are: Have you had sex with men? Have you had sex with animals? Have you touched a child with sexual intent? How often do you masturbate? Do you cheat on your wife? The applicant is denied employment allegedly based on test results. Questions addressed to the bartender include: Are you stealing from your employer? Do you like your boss? The response of "no" to each question is interpreted by the examiner as truthful. The following day, the bartender is fired. The manager of the convenience store is asked questions about where she lives, where her boyfriend lives, her dating practices, and her drinking habits. Eventually, she is asked: Did you ever steal anything? After responding "no," the examiner counters, "Yes you have! Everybody steals!" The manager is fired.

22. See, e.g., 1977-78 Hearings, supra note 5, at 264; City of Miami v. Jervis, 139 So. 2d 513 (Fla. 1962). Refusal to submit to a polygraph may cast suspicion on the worker. "[I]f you don't take the test one has to surmise there are good reasons why you don't . . . ." Id. at 516 (emphasis in original). Although the case involved a criminal investigation, the comment arguably is appropriate in the employment context. See also Note, Deception-Tests and the Law of Evidence, 15 Calif. L. Rev. 484, 501 (1927).


24. Questions allegedly posed by an examiner as described by a firefighter applicant. The Phil Donahue Show, Companies that Require Employees to Take Lie Detector Examinations, April 14, 1983.


26. Questions allegedly posed by an examiner as described by a manager. Bonner, supra note 7, at 4, col. 4. A jury recently awarded $219,000 to the manager and 21 others who were dismissed after taking or refusing to take polygraphs. Id. at 4, col. 3; see also MACNEIL-LEHRER, supra note 5, at 1. It was alleged that plaintiffs "suffered from emotional distress, acute personal embarrassment, loss of wages and earnings, and public
shortly thereafter. Each worker found the experience frightening, degrading, abusive, and humiliating.  

The preceding experiences heighten concerns over the use of polygraphs in employment. Those concerns become more compelling if the process is unreliable in discerning the truth. Opponents of corporate "lie detection" voice two primary criticisms of the truth verification process. First, the process is patently unfair. To deny employment and destroy reputations solely on the basis of an examination with questionable accuracy and reliability is unconscionable.  

Second, the process is inherently intrusive. While the device is operating, examinees are "deprive[d] . . . of any control over divulging information about [themselves]." Further, questions which intrude into highly personal areas of workers' lives, eliciting intimate statements or compelling self-incrimination by confessions of past criminal conduct, are looked upon with disapprobation.  

**Accuracy and Reliability**  

For decades, the polygraph industry and the scientific and academic communities have debated the accuracy and reliability of truth verification devices. Concern has focused on three areas: the empirical verification of the process, the emotional state of the examinee, and the competence of the examiner.  

**Empirical Verification**  

Empirical studies of polygraph reliability have focused on its use in criminal investigations. Few of those studies provide an independent assessment of accuracy. This lack of independent empirical verification is compounded in the employment context where no data
on its accuracy has been compiled.33 While acknowledging an accuracy rate of 90% in criminal investigations, David Raskin, a noted scholar and psychologist on the accuracy of the polygraph, submits its accuracy in employment situations could be "no better than flipping a coin."34 This discrepancy in assessment is in large part because of the differences between criminal and employment investigations.35 In criminal investigations, suspects have a constitutional right to refuse, without prejudice, taking an examination. In employment investigations workers may be required to submit to the examinations or face firing for their refusal.36 The coercive nature of such an examination environment reduces the examination's accuracy.37 Further, the issues raised in a criminal investigation are specific ("Did you rob the National Bank last Wednesday?"), whereas those raised in an employment investigation are frequently broad and vague ("Have you ever stolen anything?"). The examiner is asking about prior thefts while the employee may be responding about the pen she or he failed to return to work.38 The more specific the questions, the greater the accuracy of the examination.39 Unlike criminal investigations where the incident being investigated has occurred, employment investigations, particularly those involving pre-screening of prospective employees, diagnose tendencies to cause incidents in the future.40 Thus, an examinee's present honesty and future behavior is predicated on an assessment of general statements concerning past conduct.41 These "fortune-telling" techniques are highly speculative indicators of employee behavior and bring into question the

33. See MacNeil-Lehrer, supra note 5, at 5 (Professor Raskin).
34. Id. See also 1977-78 Hearings, supra note 5, at 24. "[T]here is every reason to doubt that [polygraphs] are any more accurate than, say, using a Ouija board." Id. at 445.
35. See 1977-78 Hearings, supra note 5, at 428-30; Bonner, supra note 7, at 4, col. 6 (Professor Raskin); Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations, 88th Cong., 2d Sess. 37-38 (1964) [hereinafter cited as 1964 Hearings].
36. U.S. CONST. amend. V; See MacNeil-Lehrer, supra note 5, at 4 (Professor Raskin);
37. MacNeil-Lehrer, supra note 5, at 4. See also 1977-78 Hearings, supra note 5, at 3. "One of the basic requirements for obtaining highly accurate results . . . is the voluntary cooperation of the subject." Id. at 434.
38. MacNeil-Lehrer, supra note 5, at 4. See also Hermann, supra note 29, at 85.
41. See Hermann, supra note 29, at 85.
accuracy of test interpretations. As one noted psychiatrist testified, "We have no way of determining whether an individual will . . . or will not be a good worker, or will . . . or will not be reliable, or will . . . or will not steal."43

Although industry advocates recognize "the accuracy of the technique is difficult to estimate,"44 they nevertheless continue to promote the preciseness of the process. The statistic cited most frequently is an accuracy rate of 95% in criminal investigations with a 4% margin of indefinite determination and a 1% margin of possible error.45 Those results assume the polygraph is operated by a well-trained, competent examiner using solid procedure and technique in a specific-issue examination.46 Despite the impressive figures, only 18.9% of those interpretive findings were verified.47 Critics thus charge these figures are misleading48 even though more recent studies have also found accuracy rates between 70 and 90%.49 Because methods of verification are limited to subsequent confessions of guilt or uncontrovertible evidence of innocence, it is nearly impossible to provide empirically acceptable performance data.50 This inability to verify test results is further aggravated in the employment context where follow-up with job applicants is nearly impossible.51 Regardless of the accuracy rates in criminal investigations, no conclusive statistical data on the accuracy of the polygraph in employment situations exists.52 Nevertheless, industry champions continue to create

42. Several studies have indicated approximately 30% of applicants fail the test. Laymon, Lie Detectors-Detection by Deception, 10 S. DAKOTA L. REV. 1, 31 (1965). See also 1977-78 Hearings, supra note 5, at 45 (three out of every four workers fail the test).

43. 1964 Hearings, supra note 35, at 304. Ten years later, this same conclusion was reached by a Senate subcommittee: "The fitness of the polygraph as a predicting device, while its accuracy as an indicator of past conduct remains questionable, must be even more improbable." 1974 Comm. Print, supra note 5, at 4.


45. Based on a five-year study of 4,280 suspects of criminal offenses by a leading polygraph firm, not representing the entire industry. Of this number, 64.5% were reported as innocent; 31.1% guilty; and 4.4% indefinite. F. INBAU & J. REID, supra note 17, at 111; J. REID & F. INBAU, supra note 19, at 304.

46. See MACNEIL-LEHRER, supra note 5, at 5-6.

47. 1964 Hearings, supra note 35, at 32. However, of those subjects reported guilty, only 59.3% were "interrogated with the aim of obtaining a confession" and of these, only 61.4% did confess. Thus, only 36% of the individuals who were reported guilty by polygraphs were actually verified as such. Sternbach, Gustafson & Colier, Don't Trust the Lie Detector, 40 HARV. BUS. REV. Dec. 1962, 127, 130 [hereinafter cited as Sternbach].

48. See Skolnick, supra note 14, at 699.

49. See 1974 Comm. Print, supra note 5, at 5-6 (citing several studies with accuracy ranging from 79.1 to 91.4%); Polygraph Hearings, supra note 1, at 505 (76%).

50. See 1977-78 Hearings, supra note 5, at 441; 1964 Hearings, supra note 35, at 426-27.


52. See MACNEIL-LEHRER, supra note 5, at 5 (Professor Raskin); 1977-78 Hear-
an aura of infallibility by adducing a 90% accuracy figure for employment-related use.53

Examinee Condition

The emotional and physical state of the examinee plays a significant role in the reliability of test diagnosis. Accurate results depend on the existence of stress induced by fear of detection.64 Therefore, the examinee must be convinced the device is infallible. Absent such fear, the likelihood of a correct diagnosis is marginal at best because the subject is unresponsive.55

Of particular significance to opponents, however, is that many mental states and impairments, besides lying, cause physiological responses which distort the truth verification process and defeat its validity. These include emotional tension, physiological and mental abnormalities, fatigue, and prolonged interrogation.56 Even a truthful person feels stress, fear, or anger at being subjected to polygraph examination. Extreme nervousness or excessive anxiety may cause an unusually conscientious person, when faced with questions of guilt or innocence, to reflect a false-positive—innocent but reporting physiological changes diagnosed as deceptive.67 Resentment towards feeling compelled to submit to the examination and towards the highly personal questions asked may also evoke emotional reactions “indistinguishable from . . . deception.”68 Other outside stimuli, including a

ings, supra note 5, at 24, 41 (a polygraph industry spokesperson stated, “[T]here has not been a study conducted in the pre-employment situation . . . I do not think anyone has yet derived such a structure wherein such a study could be made”). See also id. at 247, 398, 436, 447; Polygraph Hearings, supra note 1, at 163.
53. See MACNEIL-LEHRER, supra note 5, at 5; The Phil Donahue Show, Companies that Require Employees to Take Lie Detector Examinations, April 14, 1983.
54. See supra notes 13-16 and accompanying text.
57. See MACNEIL-LEHRER, supra note 5, at 1. A false-positive occurs when a person is reported guilty but is in fact innocent; a false-negative is the converse. See also 1977-78 Hearings, supra note 5, at 32, 443, 447; 1964 Hearings, supra note 35, at 292, 369, 450; F. INBAU & J. REID, supra note 17, at 66-71.
58. Bonner, supra note 7, at 4, col. 4 (Professor Raskin). See also 1977-78 Hear-
 distracting environment or an argumentative examiner, may be disruptive to the testing situation and adversely affect the reliability of the results. The most celebrated illustration of this phenomenon involved a bank officer who confessed to embezzlements which subsequent audits revealed never occurred. The young officer actually believed what he said was true. Because a polygraph is limited essentially to verifying truthful statements and is incapable of determining actual facts, the examiner was convinced the employee was guilty of embezzlement.

Examiner Competence

Claims of accuracy are dependent upon the method of test administration, the interpretation of test results, and the evaluation of examinee behavior. Thus, examiner competence is the crucial component of the truth verification process. Leading polygraph proponents concur “the most important factor involved in the use of any . . . [lie detection] instrument is the ability, experience, education and integrity of the examiner. . . .” The examiner must also have the personal character and sensitivity to acquire the trust and cooperation of the examinee. Many workers feel accused when requested to submit to a polygraph examination and realize their innocence can be established only by a pernicious machine. This reversal in the

ings, supra note 5, at 435.
59. See Skolnick, supra note 14, at 697; 1974 Comm. Print, supra note 5, at 8; A. Westin, supra note 4, at 213.
60. See Dearman & Smith, Unconscious Motivation and the Polygraph Test, 119 Am. J. Psychiatry 1017 (1963). The employer routinely required polygraph examinations. Although an audit after the first examination failed to reveal shortages, the second and third polygraphs convinced the examiner that the bank employee had stolen money. Again, the audits failed to uncover any shortages. Later, psychiatrists treating the employee found he had deep-seated guilt feelings towards his mother and wife, who were customers of the bank.
61. See 1964 Hearings, supra note 35, at 325. “If the patient said he was Napoleon, and if he believed this, the lie detector response indicated that he was telling the truth.” Id. at 290.
63. It has been estimated that examiner interpretations account for the 95% “accuracy” rate of polygraph determinations. See F. Inbau & J. Reid, supra note 17, at 112; Skolnick, supra note 14, at 699; 1977-78 Hearings, supra note 5, at 249 (“[t]he examiner is the ‘lie detector’”); Moenssens, supra note 62, at 21 (“the polygraph is very accurate when used by a competent examiner”).
64. J. Reid & F. Inbau, supra note 19, at 5. Further, inexperienced examiners have a high percentage of inaccurate interpretations. According to Horvath & Reid, the inexperienced examiners were found to be only 79.1% accurate while experienced were 91.4% accurate. Horvath & Reid, supra note 18, at 279.
presumption of innocence\textsuperscript{66} causes workers to be distrustful of a process which is totally devoid of procedural safeguards.\textsuperscript{67}

Because the analytical determinations of physiological responses are highly subjective, requiring the application of several disciplines including physiology and psychology,\textsuperscript{68} experts agree that an examiner should possess a college degree and at least five years of investigative experience to be considered minimally qualified.\textsuperscript{69} These same experts acknowledge, however, that "only about 20 percent of the individuals who hold themselves out as examiners possess . . . the training and skill required for competence in [the] field."\textsuperscript{70} Arguably, 80% of polygraph determinations are of questionable credibility.\textsuperscript{71}

\textit{Intrusiveness}

Critics charge that a far more compelling reason to moderate the use of truth verification in employment is its intrusiveness into workers' lives.\textsuperscript{72} By submitting to the examination, a worker's privacy is invaded by two forms of intrusion—one, an inability to refrain from divulging information about themselves\textsuperscript{73} and two, a loss of personal

\textsuperscript{66} Declared John E. Reid, director of a major polygraph company, "I also believe that a person who is innocent owes society an obligation to cooperate and help the authorities prove him innocent rather than be defiant and say, 'let them try to prove my guilt.'" 1974 Comm. Print, supra note 5, at 4. See also 1977-78 Hearings, supra note 5, at 256.

\textsuperscript{67} See 1974 Comm. Print, supra note 5, at 2-3.

\textsuperscript{68} See 1977-78 Hearings, supra note 5, at 249; 1974 Comm. Print, supra note 5, at 9; Moenssens, supra note 62, at 14-15; Skolnick, supra note 14, at 695, 707.

\textsuperscript{69} See 1974 Comm. Print, supra note 5, at 9; Polygraph Hearings, supra note 1, at 28.

\textsuperscript{70} Inbau & Reid, supra note 44, at 473. See also Polygraph Hearings, supra note 1, at 29; Moenssens, supra note 62, at 15 ("The law cannot allow incompetent operators to qualify as expert(s) . . . ."); A. Moenssens, R. Moses & F. Inbau, Scientific Evidence in Criminal Cases 543 (1973) ("There are, unfortunately, relatively few persons holding themselves out as Polygraph examiners who have the required qualifications . . . ."). Further, it is alleged that examiners used by private employers tend to be of a lower quality than examiners used in criminal investigations. See MacNeill- Lehrer, supra note 5, at 5. It has also been reported that polygraph operators admit many employers hire examiners not on the basis of quality of service but price. See Bus. Wk., Feb. 6, 1978, at 104. This has been confirmed in hearings before the Judiciary Committee. 1977-78 Hearings, supra note 5, at 260, 289, 321.

\textsuperscript{71} As Senator Sam Ervin noted, "It seems most likely that the 80 percent would do more harm than the 20 percent would do good." Views of Our Readers, 50 A.B.A. J. 602 (1964). For interesting anecdotes "substantiat[ing] these conclusions," see Burkey, supra note 32, at 81-84.

\textsuperscript{72} See Hermann, supra note 29, at 153-54.

\textsuperscript{73} Id. at 130, 153.
dignity from potentially dehumanizing questions.  

The theory underlying polygraph examinations rests on the measurement of physiological responses. Once the device is connected, the monitoring and recording of those responses begin and continue throughout the interrogation. Physiological responses are recorded regardless of whether answers are verbalized. Thus, a worker’s silence to questions she or he chooses not to answer nevertheless elicits physiological responses interpreted as truthful or deceptive by an examiner. The intrusion occurs by the worker’s inability to determine “when and under what conditions . . . thoughts, speech, and acts should be revealed to others.” This loss of testimonial control is particularly troublesome to workers who involuntarily incriminate themselves for past conduct, despite the noncriminality of the investigation. Any external dissemination of examiner interpretations only serves to magnify the intrusiveness into, and the loss of control by workers over, their private affairs.

74. Id. at 154.
75. See supra notes 13-16 and accompanying text.
76. See generally 1977-78 Hearings, supra note 5, at 263; Hermann, supra note 29, at 129.
77. See 1977-78 Hearings, supra note 5, at 255-56, 263.
78. See id. at 249, 263.
80. See Report on the Use of Polygraphs as “Lie Detectors” by the Federal Government Based on a Study by the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations, H.R. REPORT NO. 198, 89th Cong., 1st Sess. 19-20 (1965) [hereinafter cited as 1965 Report]. “The polygraph technique forces an individual to incriminate himself and confess to past actions which are not pertinent to the current investigation.” Id. For a discussion of fifth amendment concerns in the private context, despite the lack of state action, see Hermann, supra note 29, at 130-31. Language contained in Schmerber v. California, 384 U.S. 757, 764 (1966), suggests polygraph responses are testimonial: “Some tests seemingly directed to obtain ‘physical evidence,’ for example, lie detector tests . . . may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to [such] testing . . . is to evoke the spirit and history of the Fifth Amendment.” See also Markson, A Reexamination of the Role of Lie Detectors in Labor Relations, 22 LAB. L.J. 394, 400-01 (1971).
81. Since the information is not privileged, examiners and employers can supply incriminating details to other employers and agencies. A CBS news broadcast compared the external dissemination of polygraph results to an inaccurate credit rating, following employees from job to job. CBS Evening News, Lie Detectors On-the-Job, July 28, 1982. See Hermann, supra note 29, at 96; 1977-78 Hearings, supra note 5, at 262; 1964 Hearings, supra note 35, at 373 (Congressman Moss remarked that worker lie detector examinations result in “dossiers [being] built up and transferred from one employer to another and permanent prejudice can be created.”) See also 1965 Report, supra note 80, at 19-20 (“The polygraph operator and his superiors then decide whether to refer derogatory information to other agencies or officials.”); 1974 Comm. Print, supra note 5, at 4. See also Peller v. Retail Credit Co., 359 F. Supp. 1235 (N.D. Ga. 1973), aff'd, 505 F.2d 733 (5th Cir. 1974) (worker failed pre-employment polygraph examination and was denied employment by Employer 1. Examiner supplied results to a credit reporting agency. Worker was hired by Employer 2 but was subsequently fired because of polygraph results.
The privacy of a worker’s life is diminished further by the nature and extent of inquiry during the examination.82 Opponents charge that workers are subjected to numerous intrusive questions about their personal thoughts, attitudes, beliefs, and sexual habits, which are irrelevant to and go well beyond the job-related concerns of employers.83 By probing the “inner domains” of workers, the questions interfere with their personal autonomy.84 Not only are some questions highly offensive but they may reduce the accuracy of test results.85 Commented one critic, “[The examinations are] abusive to the employee and virtually useless to the employer.”86

Acknowledging some private users abuse polygraph examinations, the American Polygraph Association claims reputable examiners are encouraged not to ask unethical questions, particularly those concerning political affiliations, religious beliefs, sexual habits, and union activities.87 A review of a polygraph technician’s instruction manual, however, prompted one author to categorize the recommended interrogation into the following four areas:

1. First, questions about past dishonesty or criminal activity, detected or undetected, related or unrelated to work; second, questions about past work record and attitude toward the job for which application is being made, and underlying motives for seeking employment; third, questions about mental or physical problems, or about family difficulties which may affect work activity; and fourth, questions about accident experiences, personal habits, political activity and personal associations.88

The nature of the questions and their accompanying comments suggest examiners are to elicit not only intimately personal revelations but also unwarranted explanatory remarks, enabling the extraction of even more personal information.89 Arguably, the dignity of workers is compromised and their integrity impugned.

82. See supra notes 23-26 and accompanying text.
83. See MACNEIL-LEHRER, supra note 5, at 2-3. Opponents claim examiners ask questions which are legally prohibited for employers to ask. Bonner, supra note 7, at 4, col. 3. See also 1977-78 Hearings, supra note 5, at 249-250, 255 (no realistic limit on the types of questions to be asked exists); 1974 Comm. Print, supra note 5, at 1.
84. See A. WESTIN, supra note 4, at 237-38.
85. See supra note 59 and accompanying text.
86. Bonner, supra note 7, at 4, col. 5 (quoting Norma Rollins, director of the Privacy Project, New York Civil Liberties Union).
87. Id. at col. 6. See also MACNEIL-LEHRER, supra note 5, at 6.
88. Hermann, supra note 29, at 82-84 (after reviewing R. FERGUSON, THE POLYGRAPH IN PRIVATE INDUSTRY 128-51 (1966)).
89. Id. at 83-4. For sample questions and comments, see id. at 82-84, nn.40-44.
Workers denied employment opportunities on the basis of truth verification procedures have few remedies available to them. The absence of federal legislation and state involvement and the difficulties of establishing actionable torts effectively limit sources of worker recovery. Arbitration proceedings, where applicable, and statutes, where available, afford most worker protections.

Arbitration Proceedings

The field of labor arbitration provides extensive decisional authority to assess the status of truth verification in employment relation-


91. Despite arguments in support of extending amendments IV (unreasonable searches), V (self-incrimination) and VI (denial of counsel) to the private employment setting, with attendant ability to address employee concerns with truth verification techniques, no constitutional protection has been afforded. See, e.g., Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Spelfogel, Surveillance and Interrogation in Plant Theft and Discipline Cases, N.Y.U. 21st ANN. CONF. ON LABOR 171, 172 (1969); Hermann, supra note 29, at 140-49; 1977-78 Hearings, supra note 5, at 37, 314-15; Falick, The Lie Detector and the Right to Privacy, 40 N.Y. St. B. J. 102 (1968). One author suggested workers denied employment should seek unemployment compensation. If denied benefits on the basis of recognition of employer polygraph results, the worker could then argue state action exists and thus, constitutional arguments are appropriate. Comment, supra note 7, at 557.

92. Possible tort causes of action include intentional infliction of emotional distress, defamation, and invasion of privacy. In view of the employer's defenses of consent and privilege, however, tort actions against employers are difficult to maintain. See infra text accompanying notes 131-140. For example, intentional infliction of emotional distress requires "conduct exceeding all bounds usually tolerated by decent society . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 56 (4th ed. 1971). Employer behavior in the use of truth verification techniques may not reach the level of outrageousness deemed necessary to constitute such tortious conduct. Defamation in the employment context usually arises when the employer communicates to another (e.g., prospective employer, co-worker) derogatory worker information (e.g., polygraph results). Id. at 754. Employer defenses of truth and qualified privilege frequently preclude employee recovery. Workers encounter similar defenses in seeking recovery for tortious invasion of privacy. The tort consists of four distinct categories: (1) intrusion upon seclusion or solitude or into private affairs; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of name or likeness. Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960). One commentator has argued that truth verification techniques threaten human dignity and, as such, constitute a tortious invasion of privacy. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962, 1003-07 (1964).
ships. Workers challenging the reasonableness of security devices generally are those protected by collective bargaining agreements.83 Organized labor has fought to restrict polygraph examinations in employment, and has at times successfully negotiated a ban on their use.94 Absent total prohibition, most collective bargaining agreements provide for grievance procedures which have, as their final adjudicator of disputes, the arbitration process.95 Although following rules of procedural due process, the proceedings permit "equitable considerations and matters of policy" to influence arbitrator decisions.96 Thus, where management practices egregiously compromise the personal integrity of employees, claims of industrial efficiency may be obviated by claims of intrusion into employee privacy.97

The evidentiary value of truth verification techniques has been disputed most frequently in the context of employee dismissals. Arbitrators are called upon to determine whether employers have established just cause for dismissals, when those dismissals are predicated upon polygraph results or on refusals to submit to the examinations.98 Parroting the judicial view,99 the majority of arbitration decisions either have disallowed polygraph evidence or have assigned it

93. While union employees benefit from these efforts, job applicants who are unprotected by collective bargaining agreements are still subject to polygraph examinations. See Burkey, supra note 32, at 79; Hermann, supra note 29, at 92.
94. See A. Westin, supra note 4, at 218-21; 1977-78 Hearings, supra note 5, at 306.
98. See Paramount Wedding Ring Co. v. Amalgamated Indus. Prod., Sales & Jewelry Wkrs Union, Local 4, 71 Lab. Arb. (BNA) 1202, 1204 (1978) (Fish, Arb.) where, while recognizing the company's right "to protect its valuable inventory," an arbitrator ruled:

The courts and arbitrators are agreed that the results of polygraph tests are not evidence. In spite of the claims of those giving the tests the reaction of the individuals to the tests vary with the individuals and, therefore, are not conclusive . . . . The company presented no evidence, outside of the tests . . . . Without such evidence the company has not carried its burden of proving "good and sufficient cause" for the discharges . . . .

See also Burkey, supra note 32, at 86-87.
99. "[The] test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony . . . ." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); See also United States v. Cochran, 499 F.2d 380 (5th Cir. 1974) cert. denied, 419 U.S. 1124 (1975); United States v. Watts, 502 F.2d 726 (9th Cir. 1974); State v. Hill, 40 Ohio App.2d 16, 317 N.E.2d 233 (1974).
little probative value, on grounds of insufficient scientific support for the device's accuracy.\textsuperscript{100} Decisions rejecting polygraph evidence have also considered issues of employee privacy.\textsuperscript{101} As early as 1958, arbitrators intimated the protection of civil liberties may be paramount:

Although new wonders of technology are brought home to us every day, the time has not yet come when managements can consign to a machine the job of supervision, especially when this machine is to take the employee in its embrace and measure his most intimate vital processes.\textsuperscript{102}

Subsequently, in \textit{Lag Drug Company v. Int'l Bhd. of Teamsters Local 743}, the arbitrator declared the process does “invade the right of privacy and the constitutional right against self-incrimination.”\textsuperscript{103}

The exclusion of polygraph results by arbitrators has been judicially upheld.\textsuperscript{104}

\textbf{State Statutes}

The condemnation of truth verification techniques in employment has resulted in statutory circumscription of their use at the state level.\textsuperscript{105} Several states have enacted legislation either prohibiting or


\textsuperscript{101} \textit{See, e.g., Town \& Country Food Co. v. United Packinghouses Local 753, 39 Lab. Arb. (BNA) 332, 335 (1962) (Lewis, Arb.) (“Under such circumstances, the Company's demand that the four men take the 'lie detector' test or face discharge for insubordination was an invasion of privacy and an unreasonable and unwarranted exercise of management rights.”); Lag Drug Co. v. Int'l Bhd. of Teamsters Local 743, 39 Lab. Arb. (BNA) 1121, 1123 (1962) (Kelliher, Arb); Illinois Bell Tel. Co. v. System Council T-4, 39 Lab. Arb. (BNA) 470, 479 (1962) (Ryder, Arb). \textit{See also} 1974 Comm. Print, supra note 5, at 15.


\textsuperscript{103} 39 Lab. Arb. (BNA) 1121, 1123 (1962) (Kelliher, Arb.).

\textsuperscript{104} \textit{See Amalgamated Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973).}

\textsuperscript{105} In enacting California's statutory prohibition, the legislature concluded that polygraphs were inaccurate when operated by inexperienced personnel, and that their use created an employment environment filled with "suspense and distrust between employers and employees," \textit{Review of Selected 1963 Legislation}, 38 CAL ST. B.J. 604, 734 (1963). The primary concern of states regulating polygraph examinations appears to be the unreliability of the techniques not the invasion of worker privacy. Hermann, \textit{supra} note 29, at 101-102.
substantially limiting the use of polygraph examinations while other states require competency-based licensing of examiners. Distinctions in the wording of these statutes, however, reflect their relative strength in proscribing employer conduct.

To preclude involuntary administration of polygraphs, states regulating their use generally prohibit employers from “requiring or demanding” submission to the examinations as a “condition of employment.” Employers, however, are not proscribed from “requesting” that workers submit to such testing. Thus, under those statutes, voluntary utilization of polygraph testing is permissible. To preclude employers from subtly yet coercively “requesting” polygraphs, a few states have adopted a more restrictive approach by prohibiting employers from “influencing,” “requesting” or “suggesting” submission to those examinations. Regardless of the statutory language, workers are permitted to suggest their own submission to polygraph testing.


109. See 43 OP. CAL. ATT’Y GEN. 25 (1964). In interpreting the California statute to permit employer requests, the Attorney General commented no clear criteria were established to distinguish requests from demands. Id. at 27.

110. See Hermann, supra note 29, at 98.

111. See, e.g., ALASKA STAT. § 23.10.037 (1972) (require, request, or suggest); CONN. GEN. STAT. § 31-51g (West Supp. 1983-1984) (request or require); DEL. CODE ANN. tit. 19, § 704 (1979) (require, request, or suggest). See also State v. Community Distributors, Inc., 123 N.J. Super. 589, 598, 304 A.2d 213, 219 (County Ct. 1973), aff’d 64 N.J. 479, 317 A.2d 697 (1974), where the New Jersey Supreme Court upheld the statutory prohibition against suggesting a polygraph test under any circumstance. The defendant-employer maintained he had merely “inquired of” employees whether they would “volunteer” for testing. The court held:

It is eminently clear that, although defendant’s prospective employees are only “requested” to submit to lie detector tests, they are in fact “influenced” to do so psychologically by being introduced to an establishment where many employees take the tests.

Id. at 598, 304 A.2d at 218.
In an attempt to upgrade the quality of examiners and thereby improve the accuracy of test interpretations, some states have enacted legislation establishing licensing standards for polygraph operators. Although a number of statutes include similar minimum criteria for education and training, the balance of licensing requirements vary from state to state. Many statutes contain grandfather clauses which permit anyone with five years of investigative experience to administer polygraph examinations even though no criteria for evaluating that experience are defined by the statutes. A majority of statutes obligate prospective examiners to graduate from approved schools of polygraphy, while a few require their serving internships prior to licensing. Some states attempt to assure uniform and objective standards by mandating that prospective licensees pass competency examinations. A few statutes impose restrictions which limit the nature of questions raised by examiners, particularly those regarding religion, labor affiliation, prior arrest records, and sexual activities. Sanctions imposed for violation of the statutes usually are misdemeanors punishable by small fines or imprisonment or both.

112. See supra note 107.


114. E.g., ARIZ. REV. STAT. ANN. § 32-2703 (1976) (minimum age of 18 years); FLA. STAT. ANN. §§ 493.568 (West 1981) (insurance requirement); OR. REV. STAT. §§ 703.090(b) (1979) (citizen of U.S.). See also 1974 Comm. Print, supra note 5, at 16 ("the requirements placed upon examiners and the restrictions imposed on employers fall far short of the strong stand that should be taken against polygraphs.").

115. E.g., ALA. CODE § 34-25-21(b) (1977); ARIZ. REV. STAT. ANN. § 32.2703 (1976); GA. CODE § 84-5007(f) (1975); ME. REV. STAT. ANN. tit. 32, § 7155(D) (Supp. 1980); OR. REV. STAT. § 703.090(f) (1979); VA. CODE § 54-920 (1978).


118. E.g., ARIZ. REV. STAT. ANN. § 32.2701 (1976); VA. CODE § 40.1-51.4:3 (1981).

119. E.g., ARIZ. REV. STAT. ANN. § 32-2715 (1976) (fine from $300 to $1000 and/or six months in jail); ILL. REV. STAT. ch. 111 § 2429 (1978 & Supp. 1981) (fine from $25 to $500 and/or six months in jail); MISS. CODE ANN. § 73-29-45 (1973) (fine from $100 to $1000 and/or six months in jail); N.C. GEN. STAT. § 66-49.8 (1975) (misdemeanor penalty); OR. REV. STAT. § 703.990 (1979) (fine up to $1000).
RESPONSES OF EMPLOYERS

Confronted with theft losses in the billions of dollars annually, business became fascinated with truth verification techniques as a method of apprehending employee-miscreants.120 Since those employees operate undetected within an organization for an average of three years, employers extended polygraph examinations to ferret out the honest from the dishonest applicant.121 Having embraced the procedures for incidents of theft and for prescreening of applicants, business initiated periodic testing of current employees to act as a deterrent to wrong-doing.122 Eminent polygraphers, however, advised business that lie detector examinations are most effective when used only as one aspect of personnel evaluation.123 Despite this advice, business proceeded to embrace truth verification as the prime determinant of employment status, pointing to reductions in employee peculations124 and identification of dishonest applicants.125 Buoyed by the results, business focused its detection efforts primarily at the pre-employment stage and broadened the scope of inquiry. To avoid lengthy and costly background confirmations,126 polygraph examiners began verifying intentions of job permanency and information on job applications.127 With few restraints, the interrogations of prospective and current employees frequently include “any specific questions the employer wants answered,”128 including those concerning sexual activities, drug habits, and attitudes.129 Polygraph administration also is developing into a “management tool [by] which the most honest and reliable people can be promoted to higher positions in the company.”130 As criticism mounts against the use of the truth verification process, employers offer two responses: one, employers have the right to protect their property from untrustworthy individuals and two, prospective and current employees consent to test administration.

Considered as employer prerogatives, business maintains it has the

120. See supra note 5.
121. See 1974 Comm. Print, supra note 5, at 3.
122. See supra note 4.
123. See Inbau & Reid, supra note 44, at 473.
124. See supra note 8.
125. See Bonner, supra note 7, at 4, col. 3.
126. See 1974 Comm. Print, supra note 5, at 3; 1977-78 Hearings, supra note 5, at 37.
127. See Note, supra note 51, at 937.
128. Evans, supra note 2, at 10A, col. 1.
129. Id. See supra notes 22-26 and accompanying text.
130. Id.
right to require employees to comply with any order which is not in violation of the law, reasonable safety standards, collective bargaining agreements or individual constitutional rights.131 As such, the interests of employers in protecting their property from dishonest employees, in reducing the time and costs of background verifications, and in recognizing the truthfulness of employees, justify requiring the submission of workers to polygraph examinations as a condition of employment.132 Since workers have no basic common law right to secure or retain employment, employers submit they can establish standards and conditions to govern the employment relationship, including the use of truth verification techniques.133

In addition to claiming management prerogatives, companies frequently insist current and prospective employees sign consent and/or waiver forms agreeing to submit to the examinations.134 General unlimited consents may be requested also, thereby permitting employers to conduct polygraph testing whenever they deem necessary.135 These actions allegedly absolve the employer and examiner from any liability in connection with the techniques.136 On occasion, workers grant employers blanket authority to use test results as they choose, enabling companies to forward those results to subsequent employers.137 By signing consent forms, workers are said to be voluntarily submitting to the examinations.138 This assertion is made even though current employees who decline to volunteer may be faced with job sanctions.139 Similarly, job applicants who fail to consent to testing may not be considered for employment.140

The Competing Interests Analyzed

The increasing use of truth verification techniques by business is certain to heighten the recontre between the property interests of employers and the privacy interests of workers. In exercising their rights to employ and retain trustworthy individuals, employers
should have an interest in adopting methods which will, in fact, achieve those goals. The methods adopted become of particular import because the interests of business go beyond employing honest personnel. Employers also have interests in employing qualified personnel. Once employed, business invests billions of dollars annually in training those individuals and thus, has an interest in retaining trained employees. In view of all these interests, business is served best by accurate and reliable techniques which detect dishonest applicants without denying employment to honest and qualified applicants nor denying continued employment to honest and trained employees. Otherwise, the return on investment in the techniques is of questionable value.

An analysis of the techniques adopted raises serious questions as to their accuracy and reliability and thus their value to business. The truth verification process is dependent upon competent examiners, yet polygraph experts acknowledge a majority of their examiners lack requisite training and skill. Less than half of the states have addressed this issue by enacting licensing legislation. Despite licensing efforts, examiner competency standards are not uniformly rigid. Because business relies on the examiner's recommendations, it is difficult to accord much credence to interpretation of test results without explicit competency standards. Assuming, however, competent examiners administer the tests, questions about the reliability and accuracy of the process remain. The emotional and physical condition of the examinee can distort the truth verification process. Of particular import to the employment context is the resentment workers may feel towards forced submission to the examination and to the highly personal questions contained therein. Both situations evoke emotional states of being which cause physiological responses indistinguishable from those of deception. Few

141. See supra notes 32-71 and accompanying text.
142. See supra notes 62-71 and accompanying text.
143. See supra note 70 and accompanying text.
144. See supra note 107 and accompanying text. "In the majority of states, any one who buys a polygraph machine can go into business." 1977-78 Hearings, supra note 5, at 249. "In 38 states anyone who purchases a polygraph may claim to be a professional polygrapher." Polygraph Hearings, supra note 1, at 29.
145. See supra notes 113-118 and accompanying text.
146. See 1977-78 Hearings, supra note 5, at 238.
147. See supra notes 55-59 and accompanying text.
148. See supra notes 24-27, 36-37 and accompanying text.
149. See supra note 58 and accompanying text.
state statutes address those concerns. Assuming further, however, a competent examiner and a test-responsive examinee, the truth verification has no demonstrable, empirical evidence of its accuracy and reliability in employment investigations. Although consensus exists of a 70-95% accuracy rate for polygraph examinations in criminal investigations, no conclusive statistical data supports the device's accuracy in employment. It is highly improbable that accuracy figures for examinations of prospective employees, particularly, would reflect those of criminal investigations since the former forecasts tendencies for future behavior and the latter interprets involvement in past activities.

Not only is the inherent reliability highly questionable but the interpretive techniques adopted by many organizations further diminish the value of the process. Employers tend to base employment decisions on responses to control questions rather than relevant questions. The purpose of control questions is to measure the responses of relevant questions. For example, a typical control question is, “Have you ever stolen anything?” Few people can honestly respond no. Rather than evaluate the examinee’s answer to subsequent relevant questions, some employers base their decisions on responses to the control question. Thus, workers responding “no,” usually fail the examination and are not hired because of their failure. Those responding “yes,” are not hired because business prefers not to employ thieves. Of course, the thefts may involve something as simple as failure to pay fifty cents into a coffee fund.

In view of the foregoing, the investment return on the use of truth verification techniques by business for employment-related decisions is of questionable value. A similar conclusion has been reached in the field of labor arbitration where polygraph evidence is either excluded or given little probative value because of its inaccuracy and unreliability in the employment context. As a pre-screening tool

150. See supra notes 112-118 and accompanying text.
151. See supra notes 32-53 and accompanying text.
152. See supra notes 45, 49 and accompanying text.
153. See supra notes 32, 42-43 and accompanying text.
154. See supra notes 38-43 and accompanying text.
155. See Bonner, supra note 7, at 4, col. 4 (Professor Raskin).
156. See supra notes 18-20 and accompanying text.
157. Assuming a high figure of 90% accuracy rate, 10% of those tested received incorrect recommendations and two out of every three of those who fail are innocent. One commentator provides the following illustration: Assume 50 of 1000 employees commit insider theft. The polygraph will assess 45 of the 50 (90%) as guilty. Further, it will correctly diagnose 855 of the 950 innocent workers (90%) as innocent. The remaining 95 of the 950 innocent workers (10%) will fail the test. Thus, of the 140 trained employees who failed (45 plus 95), 66% or two out of every three, will be innocent. Comment, supra note 7, at 556. See also 1974 Comm. Print, supra note 5, at 7; 1977-78 Hearings, supra note 5, at 32.
158. See supra notes 99-100 and accompanying text.
for prospective employees, the devices have no verifiable value to business. Periodic, random testing of employees tends to erode employer-employee harmony by creating an atmosphere of distrust and suspicion in the work place. With the dearth of effective verification, a serious question is raised whether the inharmonious atmosphere created by those examinations complements management's desire to work in partnership with labor. Perhaps the only value to business is from the device's use in those situations occasioned by incidents of theft. Paralleling specific-issue criminal investigations and presuming competent examiners and test-responsive examinees, polygraph use for on-the-job incidents of theft frequently precipitates confessions of guilt. Although business has an interest in employing and retaining trustworthy workers, serious doubt remains as to whether the defensive measures adopted, truth verification techniques, achieve those goals.

Society also has an interest in assuring that workers are selected and retained by the least intrusive methods. While recognizing the need of business to acquire job-related information, workers view truth verification techniques as unwarranted intrusions by employers. Not only are the methods of examination potentially abusive but the tampering into highly personal matters is particularly offensive and viewed as an invasion of privacy. The scope of the right of privacy, however, is difficult to determine.

159. See Polygraph Hearings, supra note 1, at 163 (a member of the American Polygraph Association acknowledged that "such future predictions are highly speculative"); 1974 Comm. Print, supra note 5, at 4; 1964 Hearings, supra note 35, at 307; Hermann, supra note 29, at 85-86; Craver, supra note 3, at 42.

160. See Review of Selected 1963 Legislation, supra note 105, at 734 (polygraph tests disrupt the work environment); Note, Lie Detectors—Industrial Use of the Polygraph, 13 De Paul L. Rev. 287 (1964).

161. See F. Inbau & J. Reid, supra note 17, at 113 (“[the lie detector] possesses another quality of much merit and that is the psychological effect it has in inducing admissions or confessions from guilty individuals”). See also A. Westin, supra note 4, at 212; Note, supra note 51, at 938.

162. See supra notes 72-89 and accompanying text.

163. For example, when workers are exposed to hidden microphones and two-way mirrors without their knowledge, arguably their seclusion and solitude are impaired. Burkey, supra note 32, at 89. See also Coghll, THE LIE DETECTOR IN EMPLOYMENT 11 (1968). The operation of polygraph machines is also an intrusion by precluding the withholding of information by the workers. See supra notes 75-81 and accompanying text.

164. See supra notes 82-89 and accompanying text. Congressman Moss considered polygraph examinations as “a major invasion of the privacy of individuals not even suspected of crime, where the price they must pay for seeking employment is the probing on a broad basis in not only their conscious but their subconscious mind . . . .” 1964 Hearings, supra note 35, at 373.

165. “[T]here is not a clear line between what should and should not be permitted
specifically guaranteed in the Constitution, privacy has been defined as "the right of the individual to decide by himself . . . when and under what conditions his thoughts, speech, and acts, should be revealed to others." By analyzing involuntary physiological responses and penetrating the inner domains of workers, truth verification techniques diminish the vitality of the right of privacy.

Before seeking redress against employers, however, workers must overcome the obstacle of their consent to the examinations. Although workers may accede to employer requests, it is doubtful consent would be forthcoming unless their employment status were in jeopardy. Considering the disparity in bargaining power, requests or suggestions may be perceived by workers as disguised demands. Thus, a worker's freedom to choose is narrowed considerably when given the choice between submitting to the test or not being hired or retained. Faced with the economic necessity of having or holding a job, the worker's consent is neither free nor voluntary but rather coerced and nugatory. Consent is further vitiated by a worker's fear for the right of privacy." Note, supra note 51, at 944 n.91 (citing the RESTATEMENT OF TORTS, § 867, comment at 399 (1939)). See also 1977-78 Hearings, supra note 5, at 239 ("the attempt to reach into another person's mind and to measure their feelings and their intentions . . . is the ultimate invasion of privacy").

Although lacking a specific guarantee in the Constitution, the right of privacy has been considered a natural right. "Those [interests] which are secured . . . are called legal rights; those which ought to be secured are called natural rights." Pound, Interests of Personality, 28 HARV. L. REV. 343, 346 (1915).

Hermann, supra note 29, at 127-28. See also 1974 Comm. Print, supra note 5, at 2 ("[a] person does not relinquish to either his public or private employer his First Amendment rights or the privacy of his thoughts and beliefs, when he enters into the employment process"). Even polygraph enthusiasts concede there is an invasion of privacy but dismiss it as follows: "[O]ne must conclude that while polygraph examination does invade the privacy of a thief, he has no paramount right to keep his crime private." Note, supra note 51, at 947 n.107. One could question, however, whether workers have no paramount right to keep their political affiliations, sexual preferences, and practices and other related matters private.

See supra notes 134-140 and accompanying text. See also 1964 Hearings, supra note 35, at 44-45:

Proponents of the use of the polygraph fall back on the statement that no one is forced to take a polygraph test . . . [T]his is of little or no avail because the examinee does not realize that not only will his conscious thoughts and his automatic responses to them be recorded but his unconscious thoughts will also be delved into and consequently he will be giving . . . autonomic responses to thoughts of which he is totally unaware.

See 1974 Comm. Print, supra note 5, at 12; 1977-78 Hearings, supra note 5, at 251; Craver, supra note 3, at 37.


See Hermann, supra note 29, at 77; A. Westin, supra note 4, at 240; Laymon, supra note 42, at 28.

See 1977-78 Hearings, supra note 5, at 251; A. Westin, supra note 4, at 240; Laymon, supra note 42, at 28.

See Hermann, supra note 29, at 77; A. Westin, supra note 4, at 239 ("It is also important to understand the meaninglessness of such terms as 'consent' and 'voluntary' in the context of polygraphing today . . ."); 1974 Comm. Print, supra note 5, at 4, 12; Falick, supra note 91, at 109 ("[t]he employer's seemingly complete control over the outcome of the employment application or continued employment means that con-
of appearing dishonest by failure to submit to the examination.\textsuperscript{173} These views of worker consent are shared by arbitrators in labor disputes.\textsuperscript{174}

Having overcome the obstacle of consent, workers will continue to insist their right to privacy is trampled upon by "unreasonable inquiries and disclosures [into their] personal and private affairs."\textsuperscript{175} Considerable difficulties remain, however, in fashioning a remedy against those private employers whose actions invade worker privacy. The absence of state involvement\textsuperscript{176} and the reluctance of the judiciary\textsuperscript{177} severely circumscribe a worker's opportunity for redress. Aggravated further by limited accessibility to arbitration proceedings and availability of statutory protections, the majority of workers are

\begin{itemize}
  \item \textsuperscript{173} See supra note 22; 1977-78 Hearings, supra note 5, at 257, 264; State v. Community Distributors, 23 N.J. Super. 589, 304 A.2d 213, 218-19 (1973) ("[b]y merely 'requesting' the employee to take the test, the employer is in fact offering the employee an ultimatum—either he takes the test or he puts his character in doubt among management as well as his fellow workers").
  \item \textsuperscript{174} See e.g., B.F. Goodrich Tire Co. v. Int'l Bhd. of Teamsters Local 743, 36 Lab. Arb. (BNA) 552, 558 (1961) (Ryder, Arb.) ("[t]he implicit social threat to an employee . . . so compels consent that a guiltless but emotionally fearful employee has practically no choice but to consent to a testing procedure . . . ."); Amalgamated Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973); Falick, supra note 91, at 105.
  \item \textsuperscript{175} Note, supra note 51, at 944.
  \item \textsuperscript{176} See supra note 91. Although the extensive constitutional arguments, including invasion of privacy, require state action which is lacking in the private-sector employment relationship, one commentator has argued persuasively that large corporations should be considered government entities. Because of their vast economic power, business satisfies the role of government by serving a public function. Coupled with their being creatures of state government, corporations can be held to the same constitutional standards to which states are held. Hermann, supra note 29, at 141-42.
  \item \textsuperscript{177} See supra note 92. Although recognizing a right of privacy in the penumbras of the Constitution, federal courts generally are not receptive to extending that right to personal information collected by others. United States v. Miller, 425 U.S. 435 (1976) (rejected right of privacy to personal information contained in bank records). Recently, however, the Supreme Court took judicial notice of the "sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence." Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979). Subsequent lower court decisions have interpreted the above as a "concern for privacy of the individual employee." Int'l Union of Elec., Radio and Mach. Workers' AFL-CIO-CLC v. NLRB, 648 F.2d 18 (D.C. Cir. 1980); see also United States v. Westinghouse, 638 F.2d 570 (3d Cir. 1980); E.I. duPont de Nemours & Co. v. Finklea, 442 F. Supp. 821 (S.D. W. Va. 1977) (recognized worker's privacy interests in their medical records); United States v. Perkins, 383 F. Supp. 922 (N.D. Ohio 1974): "With the uncontrolled development of technological means whereby anyone can invade the privacy of another . . . , the essential need for protection of this penumbral right becomes apparent." Id. at 926. "[O]f particular concern is the lie detector . . . [T]hese devices are not foolproof and they do constitute an invasion of privacy." Id. at 926 n.1.
\end{itemize}
denied an effective remedy. Whether the nature of the right of pri-

vacy should encompass protections from truth verification techniques

is best answered by Justice Brandeis who argued, in essence, that the

ingenuity of men in devising technological devices should not succeed

in outflanking the law. 178 Thus, individual rights should be viewed

from the perspective of constantly changing conditions to assure that

[t]he replacement of the human eye, ear and nose by more sophisticated

technical devices is increasingly seen . . . as a revolutionary step in stripping

individuals of their privacy. 178

The truth verification process, which goes well beyond replacing the

eyes and ears of management, contains those technological devices

which "strip individuals of their privacy" and thus, should not "out-

flank the law." 180 The worker's loss of human dignity is the same,

whether the invasion of privacy is by government or by private em-

ployer. 181 Although not secured legally, worker privacy ought to be

secure from invasion by employers using truth verification tech-

niques. In the past, Congress has afforded protection to and vindicated

the civil liberties of workers by regulating unreasonable activities which infringe upon their interests. 182

A RECOMMENDATION

Faced with competing legitimate interests, Congress must weigh

the property interests of employers against the privacy interests of

workers. Any balancing of those interests must consider whether

there are alternative measures of protection.

From the perspective of the employer, business has a right to se-
cure its operations. Employers have become proselytized to

polygraphs, believing security is provided by "a metal box in the

hands of an investigator [which] detect[s] truth or falsehood." 183 In

reality, evidence to support this conclusion is lacking. The reliability

of truth verification techniques to ferret out the dishonest from the

honest workers is yet to be proven. If reductions in theft coincide

with introduction of polygraphs, the fear generated by those devices

may cause the reduction rather than an accurate singling out of sus-

See Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J.,
dissenting). Although the case involved wiretapping, arguably the reasoning is applicable
to truth verification devices.

179. Beaney, The Right to Privacy and American Law, 31 LAW & CONTEMP.
PROBS. 253, 264 (1966).

180. See supra note 178 and accompanying text.

181. Id.


183. 1965 REPORT, supra note 80, at 31. See also 1974 Comm. Print, supra note
5, at 4.
pect or guilty workers.¹⁸⁴ Should a verification procedure be developed, it is unlikely to support a high degree of accuracy since the features of employment-related use reflect those which experts maintain distort the truth verification process. Business has alternative methods to secure its operations. Tighter internal controls, investigatory procedures, inventory monitoring and supervisory vigilence can be adopted. Intense verification of work references and work records, coupled with proper probationary evaluations, also should reduce the likelihood of security violations. Although those techniques are less expeditious than truth verification, business relies on them in states which currently prohibit polygraphs in employment.¹⁸⁵

From the workers' perspective, the truth verification process involves a loss of personal freedom and dignity. The degradation of humanitarian and constitutional values becomes more compelling when coupled with the incontrovertible deficiencies in the accuracy and reliability of the process. Workers, however, have few alternatives to protect their privacy interests. By refusing to submit or failing to consent to the examinations, they risk having or holding a job.

Truth verification is a process based on mental intimidation and fear which values business expediency as the price of worker privacy.¹⁸⁶ However, the protection of worker privacy is sufficiently important to justify the "loss of some ease of personnel administration."¹⁸⁷ Rather than totally prohibit the use of polygraph examinations in employment, as is currently proposed in Congress,¹⁸⁸ I recommend legislation which will.

1. Develop a broad definition of truth verification techniques. Otherwise, legislation limited to polygraph examinations will permit the use of less-accurate devices such as the "wiggle seat." The definition should apply to pre-

¹⁸⁴. See 1977-78 Hearings, supra note 5, at 31.
¹⁸⁵. See Bonner, supra note 7, at 4, col. 3; Didato, Why Employees Steal, San Francisco Chron., Aug. 21, 1983, This World, at 9, col. 1; Walker, supra note 5, at 6, col. 5.
¹⁸⁶. See 1974 Comm. Print, supra note 5, at 11 ("the right to privacy in our minds, to speak or keep silent about our thoughts, is one of the oldest and most basic principles of human individuality and life. Such a valued tradition should not be tampered with for reasons of alleged expediency").
¹⁸⁷. Hermann, supra note 29, at 154. See also 1974 Comm. Print, supra note 5, at 12 ("[t]he price of gaining employment must not be surrendering civil liberties").
sent and future devices.

2. Apply to any person(s), firms, corporations, associations and business organizations engaged in interstate commerce. Organizations involved with national security, public safety, and pharmaceuticals may be excluded from coverage.¹⁹⁰

3. Bar the use of truth verification techniques for pre-employment screening of prospective employees and for periodic, random examination of current employees.

4. Prohibit employers from "requiring or demanding" employee submission to truth verification techniques in the investigation of specific incidents of theft. Permit employers to "request" or "suggest" employee submission provided there is reason to suspect the employee in question. Employers must advise these employees of rights with regard to such testing and have the burden of demonstrating any subsequent consent is noncoerced.

5. Require written employee consent to specific-incident testing. Prohibit blanket consents.

6. Limit examination subject matter to questions concerning the specific acts of wrong-doing under investigation.

7. Prohibit disciplinary action based solely on examination results.

8. Permit employees to require a retest or a recheck of test interpretations.


10. Permit employees access to and the right to copy test results.

11. Require employers to maintain complete records of testing for three years, including verbatim transcripts.

12. Establish standards governing the conduct of examinations, such as the test environment, minimum competency-based criteria for examiners.

13. Impose fines and/or imprisonment for violation of the legislation.

14. Permit employees a private cause of action, including reinstatement and/or back pay, damages, and upon proper proof, punitive damages.

¹⁹⁰ Any fundamental right is not absolute and thus, a compelling interest may outweigh the right being regulated. Arguably, the interests of organizations involved with national security and pharmaceuticals may outweigh the privacy interests of workers to the extent of knowing about criminal and drug-related activity and/or aspirations. But see Hermann, supra note 29, at 152-53.
CONCLUSION

While no doubt business has suffered from costly insider crime, their solutions go well beyond detecting the honest from the dishonest employee. Employers have developed a seemingly insatiable appetite to learn all things about all people. Rather than providing workers with a choice in responding, business now expects answers and has adopted truth verification methods to insure those answers are forthcoming. As business grows more infatuated with the use of truth verification techniques, workers may find George Orwell particularly prophetic as they are plugged into all forms of Orwellian technology. Without Congressional modification of the practices, a worker's right of privacy will become meaningless. Uncontrolled truth verification techniques are an insidious search of the human mind and are a breach of the most fundamental of human rights. They provide a vehicle of excursion into the most private recesses of the human mind. Even if the polygraph testing was trustworthy, there is still no possible justification for such "mental wiretapping."192

191. See Comment, note 7, at 551, citing 4 Wigmore on Evidence, § 2251 (2d ed. 1923) ("[i]f there is a right to an answer, there soon seems to be a right to the expected answer,—that is, confession of guilt").

192. 1965 Report, supra note 80, at 43 (statement of Congressman Cornelius Gallagher).